

THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re application: Barroso et al.

Serial No.: 10/811,003

Filed: March 26, 2004

**For: Flavor Selection and
Optimization Process**

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Group Art Unit: 1794

Examiner: Wong, Leslie

**Mail Stop Appeals
Commissioner for Patents
P. O. Box 1450
Alexandria, VA 22313-1450**

**ATTENTION: Board of Patent Appeals
and Interferences**

APPELLANT'S REPLY BRIEF (37 C.F.R. § 41.41)

In the Examiner's Answer mailed April 30, 2008, the Examiner made several statements that the Applicant wishes to address. Accordingly, this reply Brief is being filed, pursuant to 37 C.F.R. § 41.41.

The Examiner asserts

"The order of events is seen to be no more than a matter of choice and well-
within the skill of the art. Appellant states on page 14, lines 16-18, of the
specification, that "specific sequential order need not be followed."¹

"Office personnel should consider all rebuttal arguments and evidence presented by
applicants. See, e.g., *In re Soni*, 54 F.3d 746, 750, 34 USPQ2d 1684, 1687 (Fed. Cir. 1995) (error
not to consider evidence presented in the specification)." MPEP 2144.08IIB. Consideration of
rebuttal evidence and arguments requires Office personnel to weigh the proffered evidence and

arguments. *Id.* Office personnel should avoid giving evidence no weight except in rare circumstances. *Id.*

Applicants direct the Board's attention to our previous response to this argument, provided in the appeal brief on page 8, line 2 and presented again below for the Board's convenience.

First of all the Examiner has taken the Applicant's disclosure out of context. The full relevant part of the specification indicates, "Thus, while **Figure 3** depicts the steps in a sequential order, that specific sequential order need not be followed." Clearly it is the steps disclosed in Figure 3 that the Applicant is referencing. Figure 3 is clearly limited and related to consumer testing. Figure 1 best references the claimed sequential method of the present invention. Moreover, Applicants explicitly spell out the steps in the patent application as occurring sequentially. For example, Applicants explicitly state the following:

1. Accordingly, first, a demographic group is identified **110**. (orig. spec. p. 9, ln. 8) (emphasis added)
2. Second, a plurality of flavor drivers familiar to the demographic group selected in the first step **110** are identified **120**. (orig. spec. p. 10, ln. 3) (emphasis added)
3. Third, a desired product concept for the food product is identified **130**. (orig. spec. p. 10, ln. 19) (emphasis added)
4. Returning to **Figure 1**, the fourth step in the overall process comprises identifying, by way of special consumer testing within the desired demographic group, at least one flavor driver that supports the desired product concept **140**. (orig. spec. p. 11, lns. 18-20) (emphasis added).

Consequently, the claimed invention is clearly directed towards an efficient, sequential method to successfully introduce an additive into a food product. It is clear then that the preamble requiring the sequential limitation "breathes life and meaning into the claim." *Kopa v. Robie*, 88 USPQ 478 (CCPA 1951). Earle et al, on the other hand, fails to recognize such an efficient method can be utilized and instead teaches that , "Often these activities are not sequential from consumers to food technologists but they are cycling backwards and forwards between the three groups, as the concepts of the product characteristics identified by the consumers gradually become the physical and chemical testing of the food technologists." (Earle, p. 230, lns. 5-9) (emphasis added).

Secondly, to alleviate any confusion, the claim was amended after the non-final office action to require that the steps occur sequentially. All limitations of the claimed invention must be considered when determining patentability. *In re Lowry*, 32 F.3d 1579, 1582, 32 U.S.P.Q.2d 1031, 1034 (Fed. Cir. 1994). The Examiner cannot ignore the amended claim limitation that the steps occur

¹ Examiner's Answer, p. 4.

sequentially. The fact that the claimed order is sequential requires that the prior art teach or suggest the sequential method, which it clearly does not. Consequently, in light of the above, Applicants respectfully request the Examiner withdraw the rejections as to claims 1-15.

The Examiner's failure to consider the above argument is in error. Consequently, for at least this reason, Applicants respectfully request the Board overturn the Examiner's rejections as to all pending claims.

Further, the Examiner failed to address the claims in Group II, Group III, Group IV, or Group V of the Appeal Brief. Consequently, for at least this reason, Applicants respectfully request the Board overturn the Examiner's rejections as to those claims.

The Examiner has also failed to make a *prima facie* case of obviousness. On page 4, paragraph 3 of the Answer, the Examiner states, "Earle et al also teach the development of a new sauce product, wherein the demographic group is New Zealanders (specifically Auckland), six flavors are identified, the product is tested by the consumers, and some flavors are removed from production and new flavors area added (see all of Section 7.4, pages 340-345, including Table 7.6). It is noted that the identified flavors are the flavor drivers and the sauce product is the desired product concept."

All limitations of the claimed invention must be considered when determining patentability. *In re Lowry*, 32 F.3d 1579, 1582, 32 U.S.P.Q.2d 1031, 1034 (Fed. Cir. 1994). While Earle does disclose that the identification of six flavors for the product, there is no hint that Earle teaches or suggests the limitation of identifying a plurality of flavor drivers familiar with the demographic group. Earle fails to teach or suggest tying the flavors to the demographic group, but rather perceives a need for a new product that is upbeat, modern, quirky, as disclosed in section 7.4.1 of the Earle et al reference. Such approach, again is the type of bottom up approach the Applicants discuss the prior art is replete with. In fact, a careful reading pages 340-

345 of Earle et al reveals that the reference fails to teach or suggest consumer testing of a demographic group, which is another required limitation of the claimed invention.

Consequently, Applicants respectfully request the Board overturn the Examiner as to all pending claims.

CONCLUSION

In view of the above arguments, Appellant respectfully submits that all the extant claims are allowable over the cited prior art and that the application is in condition for allowance. Accordingly, Appellant respectfully requests the Board of Patent Appeals and Interferences to overturn the rejections set forth in the previous Office Action. No fees are believed to be due, however, the Commissioner is hereby authorized to charge any additional payments that may be due to deposit account 50-0392.

Dated: May 23, 2008



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